93-5161

No. _____

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In The

Supreme Court of the United States

October Term, 1993

ORIGINAL

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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ORIGINAL
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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, WILLIAM ARNOLD PROCTOR, requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to do so before the California Supreme Court and has proceeded in the California trial court and the California Supreme Court with the assistance of court-appointed counsel. Petitioner's affidavit in support of this motion is attached hereto.

DATED: July 7, 1993

Wendy C. Lascher
WENDY C. LASCHER,
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

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v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, William Arnold Proctor, being first sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No ✓



a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of you last employment and the amount of the salary and wages per month which you received.

March of 1982, on the job training, truck driving school, ~~[illegible]~~ minimum wage

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes _____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve past months.

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes _____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6-15-93.

Wm Proctor
WILLIAM ARNOLD PROCTOR

CERTIFICATE

I hereby certify that the petitioner WILLIAM ARNOLD PROCTOR has the sum of $ 0 on account to his credit at California State Prison at San Quentin where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution:

NONE

Dated: 6/21/93

C K Holmstrom, CCII
Authorized Officer of
California State Prison at
San Quentin



**CERTIFICATE OF SERVICE**

I, Wendy C. Lascher, a member of the Bar of this Court, hereby certify that on this 8th day of July, 1993, copies of the MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS in the above-entitled case were mailed, first class postage pre-paid, as follows:

Office of the Attorney General
State of California
1515 "K" Street
Suite 511
Sacramento, California 95814

District Attorney
Shasta County
1525 Court Street
P.O. Box 1320
Redding, California 96001

I further certify that all parties required to be served have been served.

Dated: July 8, 1993

Respectfully submitted,

LASCHER & LASCHER,
A Professional Corporation
WENDY C. LASCHER*,

By: Wendy C Lascher
Attorneys for Petitioner
William Proctor

*Counsel of Record

No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

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v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

Petitioner William Arnold Proctor respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in the above-entitled proceeding on December 28, 1992.

## QUESTIONS PRESENTED

This case, arising from petitioner's California murder conviction, presents the following questions:

Does California's capital sentencing scheme violate the Eighth Amendment requirement that judges' and jurors' discretion be limited and channeled:

(a) By failing to specify whether particular penalty phase factors are to be treated as aggravating or mitigating circumstances;



(b) By allowing absence of mitigating evidence to be treated as an aggravating circumstance; and

(c) By permitting a judge and jury which did not determine guilt phase issues to consider undefined "circumstances of the crime" as an aggravating factor?

## OPINION AND ORDER BELOW

The opinion of the California Supreme Court, which is published at 4 Cal.4th 499 (1992), is reprinted in the Appendix to this petition [App. A].[1/] The order denying petitioner's petition for rehearing, filed March 10, 1993, is reproduced at App. B.

## JURISDICTION

The opinion of the California Supreme Court was filed December 28, 1992 [App. A, p. 1]. Petitioner filed a timely petition for rehearing, which the court denied on March 10, 1993 [App. B].

On May 28, 1993, Justice O'Connor granted an extension of time to file this writ petition until July 8, 1993. A copy of that order is reproduced at App. C. Accordingly, this petition is timely under Rule 13 of the United States Supreme Court Rules.

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1/ The opinion is cited as App. A, followed by a specific page number for that document. The order denying rehearing is App. B. The order extending time to file this petition is App. C.

This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code §190.3 provides, in pertinent part:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.



> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> "(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
>
> "(i) The age of the defendant at the time of the crime.
>
> "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.
>
> "(l) After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. . . ."

## INTRODUCTION

Last term, the Court recognized deficiencies in California's death penalty sentencing scheme when it granted defendant's petition for certiorari in Bacigalupo v. California, No. 91-8445, and remanded to the California Supreme Court for reconsideration in light of Stringer v. Black 503 U.S. ___, 117 L.Ed.2d 367, 112 S.Ct. 1130 (1992). So far, the California court has not acted.

This month, virtually the same questions are presented to this Court in this petition, and simultaneously in several others.[2/] The frequency with which California death judgments pose Eighth Amendment issues illustrates a serious deficiency in that State's death penalty statute, which this Court should address.

## STATEMENT OF THE CASE

### Procedural History

On April 23, 1982, 20-year-old William Arnold Proctor (hereafter "petitioner") was arrested in connection with the

---

2/ These cases are already pending:
Johnson v. California, No. 92-8822
Payton v. California, No. 92-9070.

Petitioner's counsel has been informed that petitions for certiorari raising the same issues are due (as is this petition) on July 8, 1993:
People v. Alcala, 4 Cal.4th 742 (1993)
People v. Noguera, 4 Cal.4th 599 (1993)
People v. Tuilaepa, 4 Cal.4th 569 (1993).



death of Bonita Bergh Stendal [CT 481-483, 500-501[3/]]. He had been released two weeks earlier from the custody of the California Youth Authority.

On May 5, petitioner was charged with three felony counts:

1. First degree murder of the victim (California Penal Code §187[4/]), with four special circumstances:

   a. Murder in the course of burglary (§§460 and 190.2(a)(17));

   b. Murder in the course of rape (§§ 261 and 190.2(a)(17));

   c. "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" murder (§190.2(a)(14)) (petitioner's motion to dismiss this allegation was later granted) [CT 252-253]; and

   d. Intentional murder involving torture (§190.2(a)(18)) [CT 1:1-2:22].

---

3/ There were two reporter's transcripts in connection with the state court appeal. One reflects the guilt phase and mistried penalty proceedings in Shasta County. The other is for the subsequent retrial of the penalty phase in Sacramento County. These are identified by an introductory "Shasta" or "Sacto" (where clarity requires) followed by "RT", page number, colon and line numbers.
Most file documents appear in a single clerk's transcript, with unitary pagination, cited as "CT". The Shasta court's jury instructions are collected in a separate transcript, cited as "Supp. CT".

4/ All statutory references not otherwise qualified are to the California Penal Code.

2. Rape accompanied by great bodily injury (§§261.2 and 12022.8) [CT 2:23-3:3].

3. Burglary (§§261 and 12022.7) [CT 3:5-18; CT 6-8].

After a preliminary hearing, petitioner was held to answer for the three felonies [CT 4-5 and 10-155]. Petitioner pleaded not guilty to each charge and denied the "special allegations" [CT 159-160].

Two months before trial began, petitioner filed a motion for change of venue, which the court denied [CT 176-177, 180 and 196]. The day voir dire was completed, petitioner renewed his motion to change venue, but the court summarily denied the motion [CT 274-286].

The jury was seated on December 8, 1982. The trial lasted only four court days [CT 287-299]; the jury began deliberating on December 15 [CT 300]. On December 20, a day after the jury announced a potential deadlock, the trial judge commented on the evidence, including his view of petitioner's credibility. Within a few hours, the jury returned a verdict convicting petitioner of first degree murder with all then-remaining special circumstances, of rape with great bodily injury, and of first degree burglary with great bodily injury [CT 310-313].

The penalty phase began the next morning. After less than two hours of deliberation, the jury foreman announced the jury was deadlocked beyond possibility of reso-



lution, whereupon the court ordered a mistrial and discharged the jury [CT 314-315].

On January 6, 1983, petitioner again moved for a change of venue, this time successfully [CT 323-351]. The case was transferred to Sacramento County for retrial of the penalty phase only [CT 351-354]. The second jury returned a verdict finding that aggravating circumstances outweighed mitigating ones, and imposing the death penalty [CT 376-396 and 467-472].

On June 28, 1983, the Sacramento court (Hon. Sheldon H. Grossfeld) heard and denied petitioner's automatic motion for modification of judgment (§190.4(e)) [CT 528-555A]. Petitioner's appeal to the California Supreme Court followed automatically [CT 558]. The California Supreme Court did not hear argument until October, 1992.

## ISSUES RAISED BELOW (RULE 14(h))

1. Stringer v. Black (Vagueness) Challenge:

Petitioner challenged the ambiguities inherent in California's statutory aggravating and mitigating factors, and their application in this particular case, in his original briefing below. Further, when the California Supreme Court ordered supplemental briefing in 1992, petitioner raised the issue regarding the validity of his sentence with specific reference to Stringer v. Black, supra, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) and the California court address-

ed the issue in its opinion [App. A, Dissenting Opinion by Mosk, pp. 14-18].

2. Circumstances of the Crime Factor:

Petitioner raised a federal challenge to California's "circumstances of the crime" factor both in his initial briefing before the state court and his supplemental briefing, and the California Supreme Court addressed this issue in its opinion [App. A, pp. 71-73].

## FACTUAL HISTORY

At about 7:50 p.m. on April 21, 1982, 55-year-old Bonnie Stendal was seen by a fellow schoolteacher shopping at the supermarket and drugstore near her home in Burney, a tiny town in rural northern California [RT 2367:25-2369:25 and 2370:5-19; CT 221][5/]. At the same time, however, a friend noticed Mrs. Stendal's car in the driveway of her home (where it was never previously parked, and in a muddy condition, though otherwise always kept clean); the lights in the house were on and drapes open [RT 2372:13-2273:20, 2375:1-25 and 2376:17-27].

Petitioner was seen walking in Burney, not far from the Stendal home, between 5:30 and 6:50 a.m. the following morning [RT 2707:23-2711:8, 2754:22-2757:10]. Mrs. Stendal

---

5/ All record references in this fact statement are to the Shasta County reporter's transcript, unless otherwise noted.



failed to arrive at school at her habitual 7:45 a.m. Around 8:55, a secretary called the teacher's home but got no answer [RT 2380:3-2382:2]. When she went to check the home, no one answered the door, so the secretary let herself in and walked through the house, seeing nothing more untoward than a toaster oven left open and clothes on the back of a chair. A look in the garage disclosed two cars, one of which Mrs. Stendal normally drove [RT 2382:3-2387:15].

After returning to school, the secretary called the Sheriff's office. Sgt. Larry Jarrett went to the home shortly thereafter [RT 2390:25-2391:15]. He deemed Mrs. Stendal's absence "very strange" and went through the house with that in mind [RT 2397:15-2398:13]. Sgt. Jarrett saw nothing unusual, finding the house "very neat in overall appearance" except for an open pickle jar, a fork on a counter and a drawer partly open; the living room was neat but with a blanket, heating pad, pillow and magazine on the couch and a suit and bathrobe also not put away, while there was only a sheet on the bed in the bedroom [RT 2398:14-2404:3].

After this five-minute inspection, Jarrett left to contact his lieutenant, and then returned to the Stendal home; this time he noticed that the silver Mercury -- which was inside the garage and the only operable car -- was muddy and dripping, with "wipe marks back and forth" on its trunk. He called a locksmith, who opened it but found nothing significant [RT 2404:12-2406:12].

At about 4:00 that afternoon, a couple passing through the area spotted a body off the road near Lake Britton. They notified authorities [RT 2393:5-2395:25]. The body was that of Mrs. Stendal, clad in a nightgown with her hands tied behind her back and cuts and "damage" to her face [RT 2406:13-2410:1]. Thereafter, a variety of law enforcement personnel of both Shasta County and the Department of Justice descended on the victim's home [RT 2410:2-2411:7], finding cut telephone wires inside the house [RT 2416:2-25] and blood-stains on a dresser [RT 2498:8-2499:7].

Eight days after the body was found and all this investigation conducted, two of the local deputies returned to the Stendal home and, apparently for the first time, moved the victim's bedding and found underneath it "around a dozen book-lets", some of which had blood on them [RT 2444:3-2445:25]. These were eventually shown to reflect petitioner's handprint [RT 2502:19-2511:23, 2560:24-2568:14, 2828:8-20, 2830:9-2832:15, 2844:20-27]. The officers also dusted the house for fingerprints, unsuccessfully [RT 2445:26-2446:23, 2829:21-26].

Still later, on May 2, ten days after the body was found, Sgt. Jarrett "observed a cigarette butt on the -- I guess it would be on the east side of the residence . . . in the vicinity of a window", the butt being of a non-filter cigarette. Nothing in the record indicates the butt had been there any closer to the time of the offense; the contrary is shown by the fact it went unnoticed through mass police



searches of the inside and outside of the Stendal home and a civilian "clue hunt" [RT 2410:2-2411:7, 2442:14-2445:28, 2463:2-2465:13, 2495:21-2496:9; CT 216A, 216C, 221-223]. On the sill of a window Sgt. Jarrett saw indications that a hand had been on the dust, but no print could be obtained [RT 2448:7-2450:1].

The cause of death was asphyxiation, first (in the coroner's opinion) by nonfatal manual strangulation and later by ligature strangulation [RT 2875:17-2876:5]. Mrs. Stendal's body also showed cuts and bruises from blunt force and various internal injuries, inflicted by seven to nine blows [RT 2876:6-2877:28, 2879:1-24, 2886:16-2889:5], and a number of stab wounds and incisions made by a cutting instrument [RT 2889:6-2922:27]. Postmortem injuries were attributed to dragging of the already-dead body; these were deemed to rule out the place of discovery as the site of the killing [RT 2879:25-2884:22].

There were four stretching injuries outside the vagina and a fifth abrasion which was said to slide into the opening of the vagina [RT 2913:27-2914:8, 2915:16-2917:3]. The coroner opined that these were caused by more than one force, four by a foreign object, possibly a penis though of a type more often caused by something else, and a fifth probably by a penis [RT 2917:4-2918:22, 2919:7-28]. There was no lub-rication of the area, nor was there any sign of semen in or about any portion of the body [RT 2918:23-2920:12].

The autopsy surgeon described the knots which tied the victim's hands as possibly "truckers' hitches" knots [RT 2912:22-2913:27]. A truck-driving teacher identified a "truckers' hitch" as a knot taught to persons taking vocational training in trucking, such as a class petitioner had attended [RT 2730:20-2731:21].

A Shasta officer observed abrasions and apparent scratch marks on petitioner's legs, and watched another officer photograph them [RT 2540:24-2543:20; Exhibit 43]. The following day, these marks were shown to Dr. Stephens, who described them as one to four days old, and testified that he examines sexual assault victims in San Francisco and has seen "these injuries" in "a sexual assault case" [RT 2543:26-2544:6, 2927:9-2928:1]. Dr. Stephens also checked petitioner for blood but none was found, nor were there any fibers consistent with ones found in the Stendal car [RT 2580:6-2581:16, 2583:28-2584:17, 2947:8-2948:27]. He found no defensive wounds, scraped knuckles (from blows) or the like on petitioner's person [RT 2950:17-2951:27].

Petitioner's mother testified he lived at her home during the 14-day interval between his release from Youth Authority custody and the night of the 21st/22nd, but was not there that night; he had phoned at 8:00 or 8:30 p.m. to say he was at the home of another youth, Robert Manley [RT 2721:9-2722:4]. Manley, however, testified that petitioner left at 8:30 p.m. on the 21st [RT 2643:9-12].



Manley had been petitioner's cohort in committing the crime which produced the Youth Authority sentence both had served, and had also just been released. Manley had made an obscene call to Mrs. Stendal the weekend before her death, although he had been too drunk to know who dialed [RT 2684:10-2685:25]. Manley had previously broken into the Stendal home at least twice, and generally spent a lot of time there when Mrs. Stendal's son, David, was at home [RT 2672:8-2676:23, 2758:27-2759:26, 2761:16-2764:9, 2768:3-2770:27]. There was no evidence of petitioner's involvement in any break-ins. David Stendal knew that petitioner had been acquainted with Mrs. Stendal and had visited the home frequently, but had never acted disrespectfully towards Mrs. Stendal [RT 2764:10-2765:25].

## REASONS FOR GRANTING CERTIORARI

### I.

### CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT SPECIFY WHICH FACTORS ARE AGGRAVATING AND BECAUSE IT PERMITS LACK OF MITIGATING CIRCUMSTANCES TO BE CONSIDERED AS AGGRAVATING.

Under California's 1978 death penalty law, once a defendant has been found guilty of murder with "special circumstances", a jury must determine whether to impose a sentence of death or life imprisonment (California Penal Code §190.3). In making this determination, the jury must weigh the eleven aggravating and mitigating factors set forth at pp. 3-4, above. The statute, however, does not designate which

factors are aggravating and which are mitigating, nor does it give the jury any guidance as to how these factors should be applied (§190.3).

Capital sentencing statutes must provide specific, objective standards to guide a jury's discretion. Sentencing a defendant on the basis of factors that are unduly vague creates the risk of arbitrary and discriminatory imposition of the death penalty (Stringer v. Black, supra, 112 S.Ct. at 1139; Maynard v. Cartwright, 486 U.S. 356, 361-365, 108 S.Ct. 1852, 1857-1859, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 428-433, 100 S.Ct. 1759, 1764-1767, 64 L.Ed. 2d 398 (1980)). Last year the Court wrote:

> "Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance" (Stringer v. Black, supra, 112 S.Ct. at 1139).

The Court went on to direct that "when the weighing process has been infected with a vague factor the death sentence must be invalidated" (Id.).

Here, there is more than merely a lone vague factor. The entire California death penalty scheme is vague.



A. THE OVERALL VAGUENESS OF CALIFORNIA'S STATUTE

None of California's eleven listed aggravating and mitigating factors is adequately defined for purposes of the Eighth Amendment.

The first factor, for example, allows the jury to consider the "circumstances of the crime" (California Penal Code §190.3(a)).[6/] But are these circumstances aggravating factor or mitigating? What is the scope of the crime's "circumstances"? Is there a time limit on this consideration?

A jury may take into account "whether or not the defendant was an accomplice to the offense" (§190.3(j)). But the statute does not specify whether this creates a circumstance in aggravation or mitigation. The confusion wrought by this particular factor is evident in petitioner's case. The trial judge, in deciding whether or not to modify the jury's death verdict, stated that because defendant acted alone, as opposed to being an accomplice, this was an aggravating factor [Sacto RT 1627:28-1628:7]. In the California Supreme Court, petitioner argued that this ruling was error and "factor (j)" could only be used as a mitigating factor.

The State Supreme Court was divided on this issue. The majority noted that, although there was an established line of cases indicating that factor (j) was only a mitigating factor, one recent decision approved the trial court's treat-

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6/ This factor will be discussed in greater detail in Section II of this petition.

ment of evidence that defendant was the sole participant as aggravating evidence [App. A, pp. 73-74].[1/] Two justices disagreed, finding that there was no precedent for treating factor (j) as anything other than mitigating [App. A, Concurring and Dissenting Opinion of Kennard, J., pp. 4-6, Dissenting Opinion of Mosk, J., p. 17]. If the effect of this factor is the subject of debate among justices sitting on California's highest court, the law cannot be clear enough to channel the jury's discretion, as required under the Eighth Amendment (Stringer, supra, 112 S.Ct. at 1139).

Section §190.3(i) instructs the jury to consider the "age of the defendant" at the time of the crime. As with the other factors, however, there is no guidance on whether the jury should consider this statistic to be an aggravating or a mitigating circumstance. Is an 18-year old "too young to know better" but a 30-year old "old enough to know what he was doing"? The jury has unfettered discretion in interpreting the import of age.

The existence, or non-existence, of the remaining eight factors can lead to equally divergent conclusions. A defendant's mental illness, intoxication, or extreme duress may be mitigating (§190.3(d) and (g)), but is a clear mind an

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[1/] The State court concluded any error concerning factor (j) was harmless because "The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense" [App. A, p. 75]. This misses the point. The question is whether the instruction adequately guided the jury's consideration of evidence.



aggravating factor? A violent or extensive criminal history could be a circumstance in aggravation (§190.3(b) and (c)), but should the jury consider lack of a record to be a mitigating circumstance? If the victim participated in the crime, the jury reasonably could assume this is a mitigating factor (§190.3(e)). But if the victim was not a participant, is this an aggravating factor? A defendant's reasonable belief that the crime was morally justified may be a mitigating circumstance (§190.3(f)), but does the absence of this belief create aggravation?

As is readily apparent from an inspection of these eleven factors, California's death penalty law is totally lacking in the "requirement that aggravating factors be defined with some degree of precision" (Stringer, supra, 112 S.Ct. at 1136). Accordingly, this Court's guidance is needed in determining whether California's law comports with the requirements of the Eighth Amendment.

## B. PARTICULAR EFFECTS IN THIS CASE

The generalized inadequacy of California's death penalty scheme was exacerbated in this case by the prosecutor's arguments and by a mandatory death sentence instruction.

### 1. Prosecutor's Argument -- "All But Two Factors Are Aggravating"

The prosecutor here took advantage of the statute's failure to label particular factors as aggravating or mitigat-

ing by telling the jury that nine of the factors were aggravating:

> "Okay. Before I close, I would like to go over those factors, and I submit to you that in looking over those factors, there are only two mitigating circumstances and the rest in this case are aggravating" [Sacto RT 1476:21-24, emphasis added].

He then went on to state that the only two mitigating circumstances were petitioner's lack of prior violent activity [Sacto RT 1477:11-17] and the fact that petitioner was only 20 at the time of the murder [Sacto RT 1479:16-19]. Every one of the remaining nine factors the prosecutor labeled as "aggravating".

He argued that the "circumstances of the crime" constituted an aggravating factor [Sacto RT 1476:25-1477:10], as did the fact that petitioner had a prior felony conviction [Sacto RT 1477: 18-22]. He claimed that because there was no evidence that petitioner acted under the influence of a mental or emotional disorder, "that is a circumstance in aggravation" [Sacto RT 1477:23-1478:9].

The prosecutor argued that because the victim did not consent to the homicide, "that clearly is a circumstance in aggravation" [Sacto RT 1478:10-14]. The same was claimed to be true because petitioner did not reasonably believe the crime was justified [Sacto RT 1478:15-23] and because petitioner did not act under extreme duress [Sacto RT 1478:24-28]. The prosecutor also found aggravating circumstances from the fact that petitioner was not intoxicated, had no mental



disease [Sacto RT 1479:1-15], and acted without an accomplice [Sacto RT 1479:20-1481:1].

In other words, the prosecutor led the jury to believe that the absence of a mitigating circumstance must be an aggravating circumstance, precisely the danger created by the unspecific statute.

2. The Mandatory Death Sentence Instruction

Another feature of this case which made the vagueness of California's death penalty scheme so devastating was the presence of a jury instruction which mandated a death sentence if aggravating circumstances outweigh mitigating ones:

> "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" [Sacto RT 1557:24-1558:4, emphasis added; and see CT 454].[8/]

Such an instruction is calamitous in a case such as this where the jury was led to believe that the absence of a mitigating circumstance equaled an aggravating circumstance.

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8/ Although this pattern jury instruction was used in California, at the time of petitioner's trial, California authorities now state that a court "should NEVER instruct the jury in penalty phase that it 'shall' impose a sentence of death" (1 California Jury Instructions (5th ed., 1988), page 417, "Use Note" to CALJIC 8.88, emphasis in the original; and see People v. Brown 40 Cal.3d 512, 538-544 (1985)).

As indicated above, the prosecutor, himself relying on such a misunderstanding, argued that there were nine aggravating circumstances, and only two factors in mitigation. Armed with the "shall impose . . . death" instruction, the prosecutor was also able to argue that this array of illusory aggravating circumstances compelled a death sentence under California law.[9/]

Just last year, this Court stated that "Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness'. . . by placing a 'thumb on death's side of the scale'", thus "'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty'" (Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119 L.Ed.2d ___ (1992), quoting Stringer v. Black, supra, 112 S.Ct. at 1137). A system which allows the State to exploit otherwise mitigating circumstances and turn them into aggravation, and then requires the jury to impose death if aggravating factors outweigh mitigating factors places an entire hand and arm on death's side.

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9/ The prosecutor reiterated this mandatory "shall" instruction several times in his argument [Sacto RT 1473:20-1474:23], concluding by telling the jury to "return a death verdict not because you want to but because under the law of California it's necessary" [Sacto RT 1843:25-28, emphasis added].



II.

## THE "CIRCUMSTANCES OF THE CRIME" FACTOR IS UNCONSTITUTIONALLY VAGUE, ESPECIALLY WHERE A JURY THAT DID NOT DETERMINE DEFENDANT'S GUILT HAS THE RESPONSIBILITY OF RECOMMENDING HIS SENTENCE.

Even if this Court declines to reach the issue of whether California's death penalty scheme, as a whole, violates the Eighth Amendment, it should consider whether the "circumstances of the crime" factor deprived petitioner of Eighth Amendment protection.

Under California's "factor (a)", when a jury is considering whether or not to recommend the death penalty, it must appraise the "circumstances of the crime", including the existence of any special circumstances found to be true.[10/] Yet this factor fails to identify any qualitative aspect of the offense which properly aggravates punishment.

The vagueness of this factor was unusually insidious for petitioner because the jury which heard the penalty phase was not the one which had determined his guilt. In the penalty trial the circumstances of the crime was the subject receiving by far the greatest emphasis.

This Court has held that an aggravating factor that instructs the sentencer to look at the circumstances of the crime to see if it was "heinous, atrocious and cruel" is unconstitutional (Shell v. Mississippi, 498 U.S. ___, 111 S.Ct.

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10/ Of course, the jury would not be deliberating the issue of life or death if there were no special circumstances found to be true.

313-314, 112 L.Ed.2d 1 (1990); Clemons v. Mississippi 494 U.S. 738, 110 S.Ct. 1441, 1443-1444, 108 L.Ed.2d 725 (1988); Maynard v. Cartwright, supra, 486 U.S. at 361-364, 108 S.Ct. at 1857-1859). Similarly, an aggravating circumstance that instructs the sentencer to look at the circumstances of the crime to see if it was "outrageously or wantonly vile, horrible or inhuman" is unconstitutional (Godfrey v. Georgia, supra, 446 U.S. 420, 428-433, 100 S.Ct. at 1764-1767).

It follows from these cases that an aggravating factor that merely instructs the sentencer to look at the circumstances of the crime, without attempting any further limitation or guidance, is even more vague. Indeed, in several cases this Court has held that a sentencer may not simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate (Maynard v. Cartwright, supra, 486 U.S. at 363, 108 S.Ct. at 1859; Godfrey v. Georgia, supra, 446 U.S. at 429-433, 100 S.Ct. at 1765-1767; Furman v. Georgia, 408 U.S. 238, 255-257, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), concurring opinion of Douglas, J.). As Maynard stated, this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty" (486 U.S. at 363, 108 S.Ct. at 1859).



## CONCLUSION

Petitioner's jury was misinstructed in a manner which left it no effective guidance, and which made it possible for the prosecutor to distort neutral circumstances into aggravating factors. California's inadequate death penalty statute made this possible.

This Court should grant certiorari and provide badly needed guidance concerning the invalidity of California Penal Code §190.3.

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Respectfully submitted,

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